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37 **UNITED STATES DISTRICT COURT**
38
CENTRAL DISTRICT OF CALIFORNIA

39 PINKETTE CLOTHING, INC., a
40 California corporation,

41 Case No. 15-CV-04950-SJO-AJW

1 Plaintiff,

2 vs.

3 COSMETIC WARRIORS LIMITED,
4 believed to be a United Kingdom limited
5 company doing business as LUSH
6 HANDMADE COSMETICS, and DOES 1-
9, inclusive,

7 Defendants.

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**DEFENDANT'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION *IN LIMINE* NO. 4 TO
EXCLUDE HIBBARD AND
ISAACSON**

Date: January 24, 2017

Time: 9:00 a.m.

Place: 10C

9 Complaint Filed: June 30, 2015
10 Trial Date: January 24, 2017

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1 **I. INTRODUCTION**

2 Pinkette does not deny it violated the Confidentiality Mediation Agreement
 3 when it disclosed CWL's confidential Mediation Statement (the "Statement") to its
 4 experts Hibbard and Isaacson. (*See* Doc. No. 145.) Instead, Pinkette attempts to deflect
 5 attention from its clear violation by suggesting 1) that CWL delayed in raising the
 6 issue and should have brought this motion before the ADR Program Director; 2) its
 7 disclosure was inadvertent; 3) that exclusion is too severe a sanction; and 4) that CWL
 8 also violated the Agreement by bringing the details of the matter to this Court's
 9 attention. Pinkette's effort in misdirection does not change the facts: Pinkette disclosed
 10 CWL's confidential Statement to its experts, it violated the Agreement in doing so, and
 11 its disclosure was not inadvertent. Rather, it was part of a pattern of ongoing violations
 12 throughout this case that evidence Pinkette's willful disregard for established rules and
 13 bad faith, or evidence conduct tantamount to bad faith. CWL's motion to exclude
 14 Hibbard and Isaacson should be granted.

15 **II. ARGUMENT**

16 Pinkette admits that it disclosed CWL's confidential Statement to Hibbard and
 17 Isaacson and that both experts reviewed the Statement. (*See id.* at 2.) This information
 18 was considered when Hibbard and Isaacson prepared their reports. Their opinions are,
 19 therefore, tainted and should be excluded.

20 **A. CWL did not delay in bringing this motion.**

21 Pinkette accuses CWL of "inexplicable delay" in bringing this motion with the
 22 goal of "maximiz[ing] prejudice to Pinkette by waiting until the last minute when there
 23 is insufficient time to implement the simple remedy of substitute experts." (*Id.* at 2.)
 24 Not so. First, Pinkette neglects to advise the Court that on October 20, 2016, CWL
 25 specifically told Pinkette that the disclosure of the Statement to its experts was
 26 improper, that it disqualified them from testifying at trial, and that CWL would bring
 27 the issue to the Court:
 28

[Mr. Clifford]: And, Counsel, I'll tell you now, we object to this witness on the basis that he was given private information that was provided under mediation agreement and pursuant to terms of mediation which prohibit use of anything done in mediation other than for purposes of mediation. In fact, I think his entire work product is tainted by that, which disqualifies him for any testimony at trial. We'll be addressing that with the court. I'll alert you to that.

MR. BRINGUEL: Thank you. We disagree.

(Declaration of Heather J. Kliebenstein (“Kliebenstein Decl.”) Ex. 1 at 65:7-16; *see also id.* at 63:22-65:6.) Pinkette has been on notice since then that this very motion was coming. Pinkette chose to do nothing to attempt to remediate the issue, likely because there was no remedy then or now other than the requested exclusion.

The motion in limine deadline is the appropriate time to bring motions to exclude evidence, and CWL’s motion was timely. Pinkette’s suggestion that CWL purposefully delayed in order to maximize prejudice to Pinkette is completely belied by the notice given to Pinkette of this intended motion two months ago. And, more importantly, even if CWL immediately raised Pinkette’s violation following Dawes’s October 20, 2016 deposition, the outcome would be the same. The expert disclosure deadlines—September 14, 2016, for opening reports, and October 5, 2016, for responsive reports—had already passed. Pinkette could not have retained a substitute expert.

B. Pinkette’s suggestion that the ADR program director can order trial evidence excluded is wrong.

CWL’s motion seeks exclusion of testimony at trial. The ADR Program Director has no authority to make such an order. The only person with the authority to make such an order is the District Judge presiding over the trial. The General Order No. 10-11, cited by Pinkette, concerns complaints about the mediation process—i.e., when, where, who is present, etc. (Doc. No. 148-2 at 53-54 (§§ 10.1, 10.2).) It has nothing to do with how or before whom a motion to exclude evidence should be brought. And it

1 certainly does not suggest that a party cannot or should not seek exclusion of evidence
 2 at trial by filing a motion in limine.¹

3 **C. Pinkette's violation was not inadvertent. It is part of a pattern of**
 4 **repeated misuse of CWL's confidential information that evidences**
 5 **bad faith or conduct tantamount to bad faith.**

6 Pinkette asserts that its disclosure of the Statement to its experts was
 7 "inadvertent." (Doc. No. 145 at 6-7.) But when CWL first raised this issue with
 8 Pinkette in October, Pinkette's counsel asserted it had done nothing wrong. (See
 9 Kliebenstein Decl. Ex. 1 at 63:22-65:16.) If it were an inadvertent error, a very
 10 different response would have been expected upon CWL pointing it out.

11 Pinkette's assertion of inadvertence is further belied by its repeated flouting of
 12 the confidentiality rules laid out in the Protective Order agreed to by the Parties and
 13 entered by this Court. (Doc. No. 34.) On September 12, 2016, CWL was forced to file
 14 a motion for contempt and sanctions against Pinkette and its counsel for violating the
 15 Protective Order. (Doc. Nos. 56; 56-1.) In particular, CWL explained that Pinkette's
 16 counsel had shown a document, designated by CWL as CONFIDENTIAL under the
 17 Protective Order, to a third party who was not authorized to review it. (Doc. No. 56-1
 18 at 10-13 (also explaining that Pinkette's counsel failed to acknowledge his mistake and
 19 take appropriate remedial action).) The Court granted CWL's motion for sanctions in
 20 the form of attorneys' fees. (Doc. No. 95 at 1.) In doing so the Court stated:
 21 "Meticulous compliance with protective orders regarding confidentiality is
 22 essential . . . and the shifting of defendant's attorneys fees to plaintiff and/or its
 23 counsel will help to ensure that plaintiff's counsel is more careful in the future." (*Id.*)

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25 ¹ *Postlewaite* is inapposite. *Postlewaite v. Wells Fargo Bank N.A.*, No. 12-cv-4465,
 26 2014 WL 4768386 (N.D. Cal. Sept. 24, 2014). There, Defendant filed with the Court a
 27 request to appear via telephone for an upcoming mediation hearing. The Court denied
 28 the motion and noted that the ADR Rules state such requests should not be filed with
 the Judge. *Id.* at *5 n.9. This makes sense because the Judge would not have control
 over appearances at mediation. In contrast, the District Judge is the only one with
 authority to exclude evidence at trial.

1 This did not end things. Shortly after the Court's Order, CWL was forced to
 2 again raise with Pinkette violations of the Protective Order that came to CWL's
 3 attention:

- 4 • Mr. Schwartz, counsel for Pinkette in a miscellaneous action in Minnesota and
 5 not counsel of record in Case No. 15-CV-4950 (C.D. Cal.), was wrongfully
 6 shown documents designated as CONFIDENTIAL and ATTORNEYS' EYES
 7 ONLY under the Protective Order. Mr. Schwartz was not authorized to view
 8 such documents. He did not meet the definition of "Outside Counsel of Record"
 9 because he had not filed a notice of appearance in this case and, therefore, was
 10 not subject to this Court's jurisdiction in enforcement of the Protective Order;
 11 and
- 12 • Pinkette failed to mark its expert reports, which contained CWL's
 13 CONFIDENTIAL and ATTORNEYS' EYES ONLY information, as containing
 14 protected material, in violation of Section 7.1 of the Protective Order.

15 (Kliebenstein Decl. Ex. 2.) And, in addition to showing CWL's mediation statement to
 16 Hibbard and Isaacson, Pinkette provided the statement to its proposed expert Daniel L.
 17 Dawes. After being deposed during discovery, and challenged over his opinions being
 18 tainted by the improper disclosure made to him (*see, supra*, Part II(A)), Pinkette
 19 decided not to use Mr. Dawes as a witness at trial.

20 This pattern of conduct reinforces that Pinkette's violation of the Agreement and
 21 sharing of the confidential Statement occurred in bad faith or constitute conduct
 22 tantamount to bad faith, such as acting with reckless disregard for the terms of the
 23 Agreement in spite of knowledge of the applicable rules. *See B.K.B. v. Maui Police*
 24 *Dep't*, 276 F.3d 1091, 1108 (9th Cir. 2002) (counsel's reckless and knowing conduct
 25 tantamount to bad faith); *Kirschner v. Blixseth*, No. CV 11-08283, 2012 U.S. Dist.
 26 LEXIS 183275, at *70 (C.D. Cal. Nov. 1, 2012) (recklessness in combination with
 27 knowledge of the applicable legal rule sufficient to warrant sanctions under Court's
 28 inherent authority); *see also Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001)

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1 (sanctions under inherent authority available if there is bad faith or conduct tantamount
 2 to bad faith; bad faith can include variety of willful conduct such as recklessness
 3 combined with an additional factor). It was not a one-time, inadvertent mistake—the
 4 statement was provided to all three of Pinkette’s proposed experts, and it was not
 5 Pinkette’s first violation relating to improperly sharing confidential information. Full
 6 exclusion is appropriate, and any prejudice to Pinkette is of its own doing.

7 **D. Pinkette’s attempt to excuse its conduct, by complaining about how
 8 the matter was brought before this Court, fails.**

9 Pinkette argues that advising the Court of the particulars of this issue, including
 10 providing, under seal, a copy of CWL’s Statement, was itself a violation of the
 11 mediation agreement (Doc. No. 145 at 5-6, 10), and they should be let off the hook as a
 12 result. This argument is of no moment. How else can CWL address this issue and fully
 13 advise the Court of what has happened so a proper and well informed decision
 14 excluding the tainted evidence can be made? Only by providing the Statement can
 15 CWL show the court that the Statement was material and the disclosure by Pinkette to
 16 expert witnesses threatens the integrity of the mediation process for all participants.
 17 CWL acted reasonably, and any alleged wrongdoing on the part of CWL does not does
 18 not excuse Pinkette’s own actions.

19 **IV. CONCLUSION**

20 For all the reasons stated, CWL respectfully requests the Court grants its motion
 21 to exclude Hibbard and Isaacson.

22 Dated: December 30, 2016

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A Professional Corporation

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By: /s/ Deborah A. Gubernick
 Deborah A. Gubernick

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Attorneys for Defendant

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